IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12390 of 2006
With
SPECIAL CIVIL APPLICATION No. 12391 of 2006
With
SPECIAL CIVIL APPLICATION No. 12395 of 2006

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For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ASE INFORMATION SERVICE - Petitioner(s)
Versus
ARVINDKUMAR D PAREKH - Respondent(s)

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Appearance :
NANAVATI ASSOCIATES for Petitioner(s) : 1,
MR RAJESH P MANKAD for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 26/07/2006

ORAL JUDGMENT

1. Rule. Learned advocate Mr. R.P. Mankad waives service of notice of rule on behalf of the respondents. With consent of the both the learned advocates appearing on behalf of the respective

parties, this group of matters have been taken up for hearing and final disposal today.

2. Heard the learned advocate Mr. K.D. Gandhi for Nanavati Associates appearing on behalf of the petitioner – company and learned advocate Mr. R.P. Mankad appearing on behalf of the respondents.

3. In this group of three matters, on behalf of respondents, caveat has been filed by learned advocate Mr. Mankad, therefore, learned advocate Mr. Mankad is appearing on caveat on behalf of respondents.

4. In all the three matters, a different award passed by the Industrial Tribunal, Baroda in complaint under Section 33-A of the Industrial Disputes Act, 1947. This Court is disposing of all the three matters by a common order on the ground that question involved in this petitions are same and therefore, this Court has passed common order while deciding all the three matters.

5. In Special Civil Application No.12390 of 2006, respondent – Shri A.D. Parekh has filed complaint (I.T.) No.235 of 2003 in Reference (I.T.) No.177 of 1998. The case of respondent was before the Industrial Tribunal, Baroda in

complaint that respondent has retired from service on 15th October 2003. He made to retire illegally as respondent is entitled to remain in service up to the age of 60 years. According to respondent, he was permanent workman since 32 years and he was a concerned workman in Reference (I.T.) No.177 of 1998 which is pending before the Industrial Tribunal, Baroda. The respondent was appointed on 1st August 1972 as a Panch Operator and there is no certified standing order applicable to the petitioner and therefore, service condition of respondent are governed by provisions of the Industrial Employment Standing Orders Act, 1946 and Gujarat Rules, 1959. Therefore, in absence of agreement, the age of superannuation is 60 years, but petitioner has retired him on 15th October 2003 at the age of 58 years which was challenged before the Industrial Tribunal, Baroda by way of filing Complaint under Section 33-A of the Industrial Disputes Act, 1947.

6. In Special Civil Application No.12391 of 2006, the respondent is Shri R.N. Tapiwla has filed Complaint (I.T.) No.343 of 2000 before the Industrial Tribunal, Baroda. The respondent Tapiwala had worked as a permanent workman and concerned workman in Reference (I.T.) No. 57 of 1999 which is pending before the Tribunal. The respondent Shri Tapiwala was appointed on 21st

July 1963 as a Typist-cum-Clerk and confirmed with effect from 21st January 1966. In absence of certified standing order, the service conditions are governed under the Model Standing Order Act and Gujarat Rules 1959 and therefore, according to the respondent, he is entitled to remain in service up to age of 60 years. The petitioner had retired on 20th September 2000 at the age of 58 years. Therefore, this amounts to change in condition of service filed complaint under Section 33-A of the Industrial Disputes Act, 1947.

7. In Special Civil Application No.12395 of 2006, the respondent Shri Taiyab R. Barodawala has filed complaint (I.T.) No.238 of 2000 in Reference (I.T.) No.57 of 1999 under Section 33-A of the Industrial Disputes Act, 1947. The respondent – Barodawala was working as permanent workman since 28 years and he is a concerned workman in Reference No.57 of 1999 which is pending before the Tribunal. The respondent – Barodawala appointed on 1st December 1973 as an Office Assistant and confirmed on 18th June 1974. In absence of certified standing orders, according to him, as the service conditions are governed by Model Standing Order Act, 1946 and Gujarat Rules, 1959. According to him, his age of retirement will be 60 years but he retired from service on 16th June 2000 at the age of 58 years

which amounts to change in conditions of service during the pendency of reference a complaint (I.T.) No.238 of 2000 in Reference (I.T.) No. 57 of 1999 filed by the respondent before the Industrial Tribunal, Baroda.

8. The petitioner – Ambalal Sarabhai Enterprise Information Services has challenged the award of Industrial Tribunal, Baroda in aforesaid complaint dated 22nd December 2004, 31st December 2004and 29th December 2004. The Industrial Tribunal, Baroda has allowed the complaint and set aside the retirement order passed by the petitioner against the respondents declaring illegal with a direction to petitioner to pay all the back wages and other consequential benefits to the complainant – present respondents up to his reaching the age of 60 years.

9. Learned advocate Mr. K.D. Gandhi appearing on behalf of the petitioner has submitted that respondent has misrepresented before the Tribunal that the superannuating age is 60 years whereas, as a matter of fact, the superannuating age of workman of the petitioner – company is 58 years. He also submitted that petitioner–company is registered under the provisions of Bombay Shop and Establishment Act and therefore, the provisions of the Model Standing Order Act is not applicable to the petitioner. The dispute which

was pending is pertaining to various demand raised by the Union including the increase in the age of superannuation which is still pending wherein demand is raised by making false statement that superannuation age be raised from 60 years to 62 years instead of 58 years to 60 years, therefore, he submitted that the age of retirement is 58 years, not 60 years. He relied upon the decision given by this Court (Coram : Justice K.A. Puj) in ***Special Civil Application No.6967 of 1997 with Special Civil Application No.8750 of 1997*** decided on 22nd February 2006 in the matter of ***Operation Research Group Vs. J.M. Ghatak*** has held that the Tribunal was not justified in holding the age of retirement of the respondent workmen is 60 years and not 58 years. The main reference is pending for adjudication before the Tribunal and meanwhile, to pass an award in the complaint filed by the respondent is amounts to granting the full relief to the workmen. The learned advocate Mr. Gandhi also submitted that the age of superannuation of the workmen was 58 years and further submitted that during the 1979, due to recognisation of Sarabhai Group of Companies, ORG become a division of Ambalal Sarabhai Enterprises Ltd., and all the employees of the then ORG including the respondent became the employees of Ambalal Sarabhai Enterprises Ltd., on the same terms and conditions and with continuity of service. He

also submitted that complainant under Section 33-A is not maintainable as no service condition has been changed or altered by the petitioner during the pendency of reference. He also submitted that Tribunal has not considered the relevant facts and evidence on record and passed an award granting the relief contrary to the record.

10. Learned advocate Mr. R.P. Mankad appearing on behalf of the respondents submitted by filing the affidavit-in-reply of the respondents that Industrial Tribunal, Baroda has not committed any error which requires interference by this Court. He also submitted that in pursuance to the award passed by the Industrial Tribunal, Baroda, respondent has moved the authority concerned to recover the amount from the petitioner and thereafter, the petitioner has challenged the award in question after considerable delay. He submitted that this Court having limited jurisdiction under Article 227 of the Constitution of India and Tribunal has rightly appreciated the facts and evidence on record and also given cogent reason in support of its conclusion. He also submitted that in an identical case of one Shri D.K. Kshirsagar was superannuated by the petitioner – Management on 20th march 1993 at the age of 58 years, therefore, Shri D.K. Kshirsagar had filed Complainant No.31

of 1993 before the Industrial Tribunal, Baroda. The said complaint came to be allowed by an order dated 10th January 1994 granting benefit in favour of Shri D.K. Kshirsagar for a period of two years. The said award was challenged by the petitioner in Special Civil Application No.12927 of 1994 before this Court. This Court (Coram : Justice R.K. Abichandani) has rejected the petition on 12th December 1994. Therefore, he submitted that similarly in other cases also, one Shri S.C. Panchal, Shri J.J. Harijan, Shri R.K. Mandalik and Shri Natvarlal Gordhandas Mehta, wherein similar benefit has been granted by the Industrial Tribunal, Baroda and ultimately, no further proceedings on behalf of the petitioner have been initiated against the such awards which referred above. Therefore, according to him, in all the cases from Shri Kshirsagar to others mentioned above, petitioner has accepted the award passed by the Industrial Tribunal and granted the benefit to the concerned workmen. Therefore, learned advocate Mr. Mankad submitted that once this Court has examined the same contentions and rejected the petition, on the same grounds other petitions should not have to be entertained by this Court. The decision of this Court on identical issue is binding to this Court not only that but it binds to petitioner also. Therefore, in short, his submission is that the Industrial Tribunal has rightly examined the

matter and in absence of certified standing order, the Model Standing Orders are applicable and according to the provisions of Model Standing Orders, the age of retirement is 60 years, for which, rightly benefit has been granted by the Tribunal. For that, no error has been committed by the Industrial Tribunal, Baroda.

11. I have considered the submissions made by both the learned advocates appearing on behalf of the respective parties and I have also considered the contentions raised by the petitioner in his petitions as well as respondent in reply. I have also perused the award passed by Industrial Tribunal, Baroda in each complaint.

12. The question, which has been examined by the Industrial Tribunal in Complaint under Section 33-A of the Industrial Disputes Act, 1947, is whether respondent workmen are entitled the age of retirement/superannuation is 60 years or not? The industrial dispute was pending at the relevant time when each respondents were made to retire at the age of 58 years. Each respondents were the concerned workmen in the industrial dispute. In absences of certified standing orders, the Employment Standing Orders Act, 1946 is applicable to the petitioner as petitioner company is covered by definition of establishment under the provisions of Employment Standing

Orders Act, 1946. The Industrial Tribunal, after considering the reply from the petitioner, decided the issue which was raised before the Industrial Tribunal. The Industrial Tribunal has come to the conclusion and it was not challenged by the petitioner before the Tribunal that each respondents are not concerned workmen in the pending reference. The Industrial Tribunal, Baroda has considered the decisions of the Apex Court in case of ***AIR India Corporation v. V.R. Rebellow and Another*** and in the matter of ***Jaipur Jilla Sahakari Bhoomi Vikas Bank Limited v. Ram Gopal Sharma and Others*** reported in ***2002(I) LLJ 834***. During the pendency of dispute, if service condition has been changed/alter prejudice to having adverse effect to the concerned workmen then it is a legal obligation upon the employer to obtain prior permission from the concerned Tribunal as required under Section 33(1)(a) of the Industrial Disputes Act, 1947. (***See : AIR 1977 SC 1229*** in case of ***The Bhavnagar Municipality v. Alibhai Karimbhai and Others***) Undisputedly, such permission was not obtained by the petitioner when respondents made to retire at the age of 58 years. Therefore, Industrial Tribunal come to the conclusion that petitioner has violated the provisions of Section 33 of the Industrial Disputes Act, 1947. Therefore, complaint under Section 33-A is maintainable which has to decide as being Reference made under

Section 10(1) of the Industrial Disputes Act, 1947. The Industrial Tribunal has considered the provisions of standing orders which is relevant, therefore reproduce here. Rule No.25 which has been discussed by the Industrial Tribunal is relevant, therefore, relevant para 9 is quoted as under :

"Para 9 : It is pertinent to re-produce here Rule No.25 of Industrial Employment (Standing Orders) Act, 1946 :-

> ***"25. The age for retirement or superannuation of the workmen may be sixty years or such other age as may be agreed upon between the employer and the workmen by an agreement, settlement or award, which may be binding on the employer and the workmen under any law for the time being in force."***

Upon perusal of records and papers, it is found that the Complainant is governed by the Model Standing Orders as there are no certified standing orders of the opponent company. Under the Model Standing Orders, age of retirement is fixed at the age of 60 years. It is also found that there are no agreements or settlement regarding the age of superannuation between the parties in the present case.

In this connection, the object of Section 33 must be borne in mind. By enacting Section 33, the legislature wanted to ensure a fair and satisfactory enquiry of the industrial dispute undisturbed by any action on the part of the employer or the employee which would create fresh cause for disharmony between them. During the pendency of any Industrial dispute, status-quo should be maintained and no further element of discord should be introduced. That being the object of Section 33, the narrow construction of the material words used in Section 33(1)(a) would tend to defeat the said object. If it is held that the workman concerned in the dispute are only those who are directly or immediately concerned with the dispute, it would leave liberty to the employer to alter the terms and conditions of the remaining workmen and that would inevitably introduce further complications which it is intended to avoid. Similarly, it would leave liberty to the other employees to raise disputes and that again is not desirable. That is why the main object underlying Section 33 is inconsistent with the narrow

construction sought to be placed by the opponent on the material words used in Section 33(1)(a).

Even as a matter of construction pure and simple, there is no justification for assuming that the workman concerned in such disputes must be workmen directly or immediately concerned in the said disputes. In dealing with the question as to which workmen can be said to be concerned in an Industrial Dispute, we have to bear in mind the essential condition for the raising of an Industrial Dispute itself, and if, an Industrial dispute can be raised only by a group of workmen acting on their own or through their Union then it would be difficult to resist the conclusion that all those who sponsored the dispute are concerned in it. This construction that all those who sponsored the dispute are concerned in it. This construction is harmonious with the definition prescribed under Section 2(s) and with the provisions contained in Section 18 of the Act.

There is a clear prohibition in Section 33(1)(a) against altering

conditions of service by the employer under the circumstances specified except with the written permission of Tribunal or other authority therein described.

In order to attract Section 33(1)(a), the following features must be present :

(1)There is a proceeding in respect of an industrial dispute pending before the Tribunal.

(2)Conditions of service of the workmen applicable immediately before the commencement of the Tribunal proceeding are altered.

(3)The alteration of the conditions of service is in regard to a matter connected with the pending industrial dispute.

(4)The workmen whose conditions of service are altered are concerned in the pending industrial dispute.

(5)The alteration of the conditions of service is to the prejudice of the workmen.“

13. The Industrial Tribunal after considered the object of Section 33 and relevant Rule 25 of Employment Standing Orders Act, 1946, considered

all the features which are necessary to be required for violation of Section 33 has been taken into account and discussed in Para 10 by the Tribunal which is quoted as under :

> ***"10. In the present case before this Tribunal, the first feature is undisputedly present since the action has been taken by the Opponent of retiring the Complainant during the pendency of the proceeding of Reference (IT) No.177 of 1998. The second feature is also present in this case since conditions of service of the Complainant applicant immediately before the commencement of the proceeding are altered. In the present case, before this Tribunal, the conditions of service of the complainant were governed by Model Standing Orders in which age of retirement is fixed at the age of 60 yeas and the complainant was superannuated by the opponent at he age of 58 years.***
>
> ***The third feature is also admittedly present in the present case since the alteration of the conditions of service is in regard to a matter connected with the pending industrial dispute. The forth feature is also admittedly present in the***

present case since the complainant whose conditions of service are altered is concerned in the pending industrial dispute. The fifth feature is also present in the present case since the alteration of the conditions of service is to the prejudice of the complainant as he has been superannuated at the age of 58 years instead of 60 years. Besides, it is also not in dispute before this Tribunal that the opponent has not filed any permission application in writing before this Tribunal. In this view of the matter, I am of the opinion that the opponent company has committed breach of Section 33 of the Act and therefore, the Act of the opponent of retiring the complainant from 15.10.2003 is required to be declared as illegal as prayed for by the complainant and the complainant is required to be reinstated with full back wages up to his reaching the age of 60 years and other consequential benefits.“

14. In view of above discussion, it is a pure question of law / interpretation of Employment Standing Orders Act. The petitioner has not raised any contentions about that the company having their own certified standing orders. When

establishment is not having its own certified standing order under the provisions of Employment Standing Orders Act, 1946, then model standing orders are applicable to such establishment. These facts are not disputed by the petitioner before the Industrial Tribunal and not come out with the case that company having own certified standing order, therefore, Industrial Tribunal has rightly dealt with the issue that in absence of certified standing orders, the provisions of model standing orders are applicable and it governs the condition of service of workmen working with the company. Therefore, respondent made to retire by company at the age of 58 years is amounts to alteration / change in conditions of service having prejudice effect to the legal right of the workmen concerned. Therefore, Tribunal has granted relief while setting aside the order of retirement of the respondent.

15. Learned advocate Mr. Mankad has rightly relied upon the decisions which based on identical facts and circumstance of the case and it was challenged by the present petitioner before this Court vide Special Civil Application No.12927 of 1994. The petitioner has raised same and similar contention before this Court in the said Special Civil Application. This Court has examined this contention in light of the

observations made by Industrial Tribunal, Baroda and decided the petition on 12th December 1994 wherein following order has been passed by this Court (Coram : Justice R.K. Abichandani) :

> ***" The petitioner challenges the order of the Industrial Tribunal, Baroda passed on 10.1.1994 in Reference (IT) No.161/1989 directing that the petitioner should reinstate the respondent employee who was sought to be retired at the age of 58 yeas as there was violation of the provisions of Section 33(2)(a) of the Industrial Disputes Act, with the arrears of wages.***
>
> ***Admittedly an Industrial dispute was pending on various matters with which, the dispute which has sought to be raised by the respondent employee was not connected. Therefore, by virtue of Section 33(2) of the Industrial Disputes Act, approval of the Tribunal was required to be taken if the respondent employee was to be retired at the age of 58 years. This is because in his contract of employment, age was not stipulated and therefore, there admittedly not being any standing orders adopted by the petitioner, model standing orders became applicable. According to the model***

standing orders, the age of retirement was admittedly 60 years. Therefore, the learned Industrial Tribunal in his pithy judgment rightly held that in absence of any lawful agreement, settlement or award, the retirement age prescribed in the model standing orders could not have been reduced to 58 years from 60 years. He was also justified in holding that oral evidence was of no avail in view of the provisions in the model standing orders which prescribed 60 years as the retirement age. The Tribunal has acted in lawful exercise of it's jurisdiction and has not committed any error which may justify interference with it's award. This petition is therefore rejected. Notice discharged.“

16. In Special Civil Application No.12927 of 2004, petitioner – company – Ambalal Sarabhai Enterprises Limited Information Service had raised all identical questions / contentions before this Court in the aforesaid petition. The petitioner has raised all the identical questions / contentions before this Court in present group of petition except the decision which given by this Court (Coram : Justice K.A. Puj) in his submission. It is also necessary to note one

important aspect that this decision given by this Court in Special Civil Application No.12927 of 2004 dated 12th December 1994 is accepted and implemented by the petitioner and not challenged to higher Forum, therefore, this decision is binding to the petitioner and question decided by this Court is also binding to the petitioner – company then same question cannot be allowed to argue or to make submission when decision given by this Court is binding to the petitioner. Not only that this decision of this Court (Coram : Justice R.K. Abichandani) as referred above decided the same question, therefore, it also binding to this Court being an identical matter of same petitioner.

17. Learned advocate Mr. K.D. Gandhi vehemently and seriously submitted that recent decision given by this Court (Coram : Justice K.A. Puj) in Special Civil Application No.6967 of 1997 with Special Civil Application No.8750 of 1997 dated 22nd February 2006. Relying upon this decision, learned advocate Mr. Gandhi submitted that identical award passed by the Industrial Tribunal, Baroda has been set aside by this Court where the same question was involved and examined by this Court, therefore, in this case also, same view is required to be taken by this Court.

18. I have considered the decision which has been

relied by learned advocate Mr. Gandhi. It is necessary to note one important different between the two decisions is that the decision in case of ORG, the question was examined by this Court that whether definition of industrial establishment given under the provisions of standing orders Act is satisfied by the ORG or not. Considering the nature of work / business, the conclusion is that ORG is not satisfied the requirement of industrial establishment as given in Standing Orders Act, 1946. Therefore, in ORG case, a decision has been differ on the issue of whether ORG is industrial establishment or not? The specific contention was raised in ORG case but in the facts of the present case, no such specific contention was raised by the present petitioner before the Industrial Tribunal, Baroda. Therefore, the decision in ORG case is no way helpful to the petitioner because both are based on different facts. However, this Court is examining this question in light of definition of industrial establishment given in Industrial Employment Standing Orders Act, 1946. The relevant Section 2(e) of The Industrial Employment (Standing Orders) Act, 1946 reproduces hereunder:

> ***"Sec.2(e) : "industrial establishment" means -***
>
> ***(i)an industrial establishment as defined in clause (ii) of section 2 of***

the Payment of Wages Act, 1936 (4 of 1936), or

(ii)a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948), or

(iii)a railway as defined in clause (4) of section 2 of the Indian Railways Act, 1890 (9 of 1890), or

(iv)the establishment of a person who, for the purpose of fulfilling a contract with the owner of any industrial establishment, employs workmen;"

The relevant Section 2(ii)(a) to Section 2(ii)(h) of the Payment of Wages Act, 1936 reproduce hereunder :

"Section 2(ii) : [industrial or other establishment" means] any -

[(a) tramway service, or motor transport service engaged in carrying passenger or goods or both by road for hire or reward;

(aa) air transport service other than such service belonging to, or exclusively employed in the military, naval or air forces of the Union or the Civil Aviation Department of the Government of India;]

(b) dock, wharf or jetty;

[(c) inland vessel, mechanically propelled;]

(d) mine, quarry or oil-field;

(e) plantation;

(f) workshop or other establishment in which articles are produced,

adapted or manufactured, with a view to their use, transport or sale;

[(g) establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operation connected with navigation, irrigation, or the supply or water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on;]

[(h) any other establishment or class of establishments which the Central Government or a State Government may, having regard to the nature thereof, the need for protection of persons employed therein and other relevant circumstances, specify, by notification in the Official Gazette;]"

19. In light of definition of industrial establishment given in provisions in Standing Orders Act and also definition of industrial establishment in Payment of Wages Act and considering the nature of work of present petitioner which apparently satisfy the requirement of industrial or other establishment as defined in the provisions of standing order / in the provisions of Payment of Wages Act. The definition given under the provisions of standing order is that industrial establishment means "*an industrial establishment defined under the provisions of the Payment of Wages Act, factory*

and the establishment of a person who for the purpose of fulfilling a contract with the owner of any industrial establishment employees workmen." The definition under the Payment of Wages Act is as "industry or other establishment means – *workshop or other establishment in which articles are produced, adapted or manufactured, with a view to their use, transport or sale are sufficient to satisfy the requirement of industrial establishment"* and therefore, rightly, this contention was not raised by the petitioner before the Tribunal. Now, first time, such contention should not have to allow to raise to the petitioner. Therefore, petitioner is not entitled to raise this contention. Now first time, before this Court when it was not raised before the Industrial Tribunal, Baroda that petitioner is not covered by definition of industrial establishment under the provisions of Standing Orders Act, 1946.

20. According to petitioner, petitioner is doing the business of providing data processing service to its customer. In entire petition, the petitioner has not raised contention that petitioner company is not an industrial establishment within meaning of Section 2(e) of the Industrial Employment Standing Orders Act, 1946. According to petitioner, petitioner having registration under the provisions of Bombay Shops and Establishment Act, 1948. Therefore,

petitioner is covered by definition of commercial establishment as given in Section 2(4) or establishment under Section 2(8). Therefore, the aforesaid definition under the Bombay Shops and Establishment Act, 1948, petitioner is satisfied his ingredients of industrial establishment definition given under Section 2(e) of Industrial Employment (Standing Orders) Act, 1946. The petitioner has not raised such contention before Industrial Tribunal, Baroda. The petitioner has also not raised contention that petitioner having registration under the provisions of Bombay Shops and Establishment Act, 1948 and employees less than 100 workmen, the provisions of the Industrial Employment Standing Orders Act, 1946 is not applicable. No such contention was raised before the Industrial Tribunal, Baroda. But first time, these all the contentions raised before this Court in present petition. The contention which has been raised in petition as referred above are mixed question of facts and law require evidence from both the sides which cannot be examined first time by this Court while exercising the power under Article 227 of the Constitution of India. The question/contention which has not been raised before the Industrial Tribunal and first time, if it is raised, which involves mixed question of facts and law then such contention should not have to be allowed to be raised first time before this Court.

21. In ORG case as referred above has discussed this issue while keeping in mind the activities which has been carried out by ORG and considered the definition of industrial establishment given in provisions of Standing Orders Act, the relevant discussion in Para 31 and Para 32 which are quoted as under:

> ***"Para 31 : After having heard learned advocates appearing for the respective parties and after having gone through the award passed by the Industrial Tribunal and after having examined the relevant provisions of the Industrial Employment (Standing Orders) Act, 1947 as well as Model Standing Orders and after having carefully considered the authorities cited before the Court, the Court is of the view that while holding the petitioner establishment as an industrial establishment, the tribunal has relied on its earlier award passed in the case of Mr. N.G. Mehta wherein the concerned establishment was held as an industrial establishment under Section 2(e)(iv) of the said Act. The said award was challenged before this Court in Special Civil Application No. 6539 of 1996. However, the matter was settled between the parties out of the Court and hence, there is no decision on merit of this Court on the issue as to whether the petitioner***

establishment is an industrial establishment or not. It is, therefore, necessary to deal with this issue first in this matter. It is an admitted position that by process of time, the petitioner establishment does not remain a division of Sarabhai Group of Companies, but it is a part of Multi-national company. The petitioner is carrying on the business of consultancy services and market research. The industrial Tribunal has mainly held the petitioner establishment as an industrial establishment under the provisions of Clause (iv) of Sub-section (e) of Section 2 of the Act. There is no dispute about the fact that the said Clause (iv) covers within its ambit the establishment carrying on business for the purpose of fulfilling a contract with other industrial establishment and is employing workmen for that purpose. Therefore, an establishment or a Contractor, who for the purposes of fulfilling a contract with any particular industrial establishment, does not employ workmen can ever be said to be covered by the said definition. Admittedly, the petitioner establishment is not such an establishment or a Contractor who employs workmen for the purpose of fulfilling a contract with any particular industrial establishment. The petitioner is also not doing any job work for and on behalf of any particular industrial establishment nor

engaging workmen by virtue of which it may be covered under Sub-Clause (iv) of Sub-section (e) of Section 2 of the Act. The petitioner establishment is having large number of clients all over the country, for and on behalf of which it has been carrying on market research or has been rendering services by way of consultants or advisers. The petitioner establishment cannot, therefore, be said to be an industrial establishment within the definition of Section 2(e)(iv) of the Act.

<u>Para-32</u> : The tribunal has not rightly invoked other sub-clauses of Section 2(e), as the said sub-clauses are not applicable to the petitioner establishment which is not engaged in any production, manufacturing or processing activity and the law is settled on this point. Mr. Chudgar has, therefore, rightly derived support from the decisions of the Hon'ble Supreme Court referred to above for the purpose of establishing that the petitioner is neither an industrial establishment within the meaning of Section 2 (m) of the Payment of Wages Act nor a factory under the provisions of the Factories Act. If the petitioner establishment is not an industrial establishment, there is no question of application of the Act or Model Standing Orders.“

22. In ORG case, the decision of this Court in Special Civil Application No.12927 of 2004 decided on 12th December 2004 has been examined and considered in Para 34 which is quoted as under :

> ***"Para 34 : It is true that this Court has taken the decision in Special Civil Application No. 12927 of 1994 decided on 12.12.1994 wherein it is held that by virtue of Section 32 (2) of the Industrial Disputes Act, approval of the industrial tribunal was required to be taken if the respondent employee was to be retired at the age of 58 years. The Court further proceeded to observe that this was because in its contract of employment, age was not stipulated and, therefore, there are admittedly not being any Standing Orders adopted by the petitioner but Model Standing orders became applicable. According to the Model Standing Orders, the age of retirement was admittedly 60 years. The Court, therefore, held that the Industrial Tribunal in its pithy judgment rightly held that in absence of any lawful agreement, settlement or award, the retirement age prescribed in the Model Standing Orders could not have been reduced to 58 years from 60 years. It appears from this decision that the Court has proceeded on***

the footing that the Model Standing Orders prescribed admittedly the age of retirement at 60 years. However, a plain reading of the Model Standing Orders specifically states that either it is 60 years or any other date. In the present case also, neither the condition of service nor the appointment order stipulates the date of retirement at 60 years. So, the date is not fixed and by virtue of the agreement, the said date was fixed way back in 1987 and thereafter, it has been specifically conveyed even in 1995 that the date of retirement is 58 years. The Court is, therefore, of the view that the said decision rendered in Special Civil Application No. 12927 of 1994 decided on 12.12.1994 does not render any assistance to the respondent – workman."

23. It is also necessary to consider one more important aspect that in Special Civil Application No.12927 of 2004, same petitioner has not raised the contention that petitioner is not covered by definition of industrial establishment under the provisions of Industrial Employment Standing Orders Act, 1946, therefore, now, petitioner is not permitted / allowed to raise contention first time only before this Court that petitioner is not covered by definition of industrial establishment under the provisions of Standing Orders Act, 1946.

24. The provisions of Section 12(A) of the Industrial Employment (Standing Orders) Act, 1946 is relevant, which is quoted as under :

> ***"Sec.12(A): Temporary application of Model Standing Orders :-*** *(1) Notwithstanding anything contained in Secs. 3 to 12, for the period commencing on the date on which this Act becomes applicable to an industrial establishment and ending with the date on which the standing orders as finally certified under this Act come into operation under Sec.7 in that establishment, the prescribed model standing orders shall be deemed to be adopted in that establishment, and the provisions of Sec.9 sub-section (2) of Sec.13 and Sec.13-A shall apply to such model standing orders as they apply to the standing orders so certified.*
>
> *(2)Nothing contained in sub-section (1) shall apply to an industrial establishment in respect of which the appropriate Government is the Government of the State of Gujarat or the Government of the State of Maharashtra."*

The effect of the Provision is -

(i) The model standing orders framed

under the Act automatically become applicable to an industrial establishment from the date when the Act becomes applicable to that industrial establishment, and

(ii)the model standing orders which had so become applicable to an industrial establishment cease to be applicable from the date on which the standing orders prepared by the management of that establishment as finally certified comes into operation.

It is not the case of the petitioner before the Industrial Tribunal, Baroda that, the petitioner is having certified standing orders under the provisions of Standing Orders Act, 1946. Therefore, Section 12(A) is operated and applicable to the petitioner company. The Section 13-B is not applicable to company. No exemption given to petitioner company under Section 14 of the Act. Therefore, Model Standing Orders are applicable to the petitioner company. The Model Standing Orders, which are applicable to the petitioner company under the provisions of Standing Orders Act, 1946, have the force of law like any other statutory instruments.

> ***See :*** *Biswanath Das V/s. Ramesh Chandra reported in 1979 Lab. I.C. 319 at P. 322 (Orissa) :* ***See also*** *: Escorts Limited, Faridabadm, Messrs V/s. Industrial Tribunal, Hariyana reported in 1983 Lab.I.C. 223 at P.229 (P. & H.)*
>
> ***The terms of the Standing Orders (Model Standing Orders) would prevailed over the corresponding terms in the contract of service. The object of the Standing Orders Act is to required employers in Industrial Establishment to defined with sufficient precision the conditions of employment of workmen employed therein and to make them known to such workmen.***

25. The view taken by the ***Allahabad High Court*** in case of ***The U.P. Co-operative Spinning Mills Ltd., Etawah v. State of U.P. and others*** reported in ***1978 LAB.I.C. 1137*** at para 7 which is quoted as under :

> ***"7. The appointment letter dated 18th/20th Oct. 1967 appointed the petitioner on probation for a period of six months. There was further clause, as stated above, entitling the mills to extend the period of probation and it was further provided that the confirmation shall be done by a separate letter after the expiry of the***

satisfactory period of probation. From a perusal of the terms of the appointment letter it is clear that the terms and conditions are inconsistent with the Standing Orders applicable to the workman of the mills as under the Standing Orders the period of probation is only three months and there is no power given to the mills for extending the period of probation. In Western India Match Co. v. Workman (AIR 1973 SC 2650) : (1973 Lab IC 1602) the Supreme Court held that an employer cannot enter into an agreement with a workman which is inconsistent with the Standing Orders of the company. The terms of the Standing Orders would prevail over the corresponding terms in the contract of service. In view of the above mentioned principle laid down by the Supreme Court the Labour Court, Agra, has rightly not given effect to the terms and conditions as laid down in the appointment letter Annexure A-1 and as such the contention raised by the counsel for the petitioner in this regard has no substance."

26. The identical question has been examined by Division Bench of this Court in ***Gujarat***

Electricity Board v. Gujarat Electricity Employees Union reported in ***(1993) 1 G.L.H. 686***. The relevant discussion in Para 5 to 9 are quoted as under :

> ***"5. Before we proceed to consider the question so raised, it would be appropriate to deal with preliminary objection of the union that the question of jurisdiction was neither raised in the statement of claim nor was canvassed in the arguments submitted on behalf of the Board. It was, therefore, submitted that such a question cannot be entertained in the petition while exercising jurisdiction under Article 227 of the Constitution of India. Reference is made to a Supreme Court decision reported in the case of Sohan Singh and Others, 1984 (Suppl.) S.C.C. p. 661. In that case parties submitted to the jurisdiction of the Labour Court to try an issue set for trial in an application U/S. 33-C(2) of the Industrial Disputes Act, 1947 the Supreme Court observed :***
>
> ***'The High Court seems to have taken the view that the trial of such an issue was beyond the competent of the Labour***

Court; but it has rightly been point out on behalf of the appellants instead of challenging the competence or the jurisdiction of the Labour Court to try issue No.4, the respondents went to trial, submitted to its jurisdiction and when a decision was given against them by the Labour Court, they, for the first time, challenged its jurisdiction to try that issue in the High Court. On the facts of this case, therefore, we are satisfied that the High Court ought not to have entertained the point of jurisdiction urged on behalf of the respondents and set aside the order of the Labour Court on that ground alone.'

6. Reliance is also placed upon the decision of this Court in the case of G.M.D.C. v. Presiding Officer 27, 1986(1) G.L.R. At page 410. Dealing with the nature of the jurisdiction under Article 227 of the Constitution of India, it was held, as observed in para 9 of the citation, that the plea that as per Rule 3(k) of the Service Rules the concerned workmen were not the employees as defined therein and, therefore, the service Rules did not apply to them, was a plea that was

never put forward in advance by the petitioner-Corporation for the reasons best known to it and that such a plea was entirely a new plea which was sought to be raised for the first time before the High Court under Article 227 of the Constitution and that by virtue of the Supreme Court decision in the case of Mohd. Yunus v. Mohd. Mustaquim, reported in AIR 1984 S.C. p. 38, that plea could not be entertained as it was not taken in the trial Court and as it should be deemed to have been waived and given up. It was observed that if such a new contention was permitted to be taken for the fist time, it would obviously work grave injustice to the respondents – workmen who would be taken by utter surprise.

7. In the present case also, Mr. Shahani learned Advocate for the union submits, the Board did not raise the question as per the aforesaid content and spirit before the learned industrial tribunal. Mr. Shahani drew our attention to the following extract from the Establishment Manual of the Board appearing at page 411:

'(G.E.B. Circular No. LL/LAB-18/9809

dated 25/8/1964) Exemption from the Model Standing Orders.

All the filed officers hereby informed that by its Notification No.KHSH-622/IND/EMP/1961-Jh. Dated 1st August 1964, which is reproduced overleaf, the Government of Gujarat has granted exemption from the operation of the Model Standing Orders applicable to some of the employees of the Board. This exemption does not extend to the employees does not extent to the employees of the Utran Undertaking who are governed by the Utran Standing Orders as settled by the Commissioner of Labour under Section 35(2) of the Bombay Industrial Relation Act, 1946 and as modified by I.C. No.95 of 1959, and is further subject to the condition that the Gujarat Electricity Board should not make any proposals for modifications in the Service Regulations to Government in Health & Industries Department which relate to the following matters which are specified in the Schedule appended to Industrial Employment (Standing Order) Act, 1946, unless such proposals are first placed before the Commission or Labour, Gujarat State,

Ahmedabad and approved by him. The Board requested by the Government to see that the above condition is scrupulously observed.

Matters specified in the Schedule appended to the Industrial Employment (Standing Orders) Act, 1946.

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13 Age for retirement or superannuation.

14 xx xxx xxx

8. Mr. Shahani drew our attention to the fact that admittedly to the S.R. 72 which was earlier notified U/S.13B under the Industrial Employment (Standing Orders) Act, 1946 stood replaced by the amendment

of increasing the age of superannuation from 55 to 58 years and such amendment was not notified U/S. 13B of the said Act. He finally submitted that if such a contention was raised by the Board in trial Court, the union could have placed some material before the tribunal for showing that the tribunal had jurisdiction to entertain the reference and that the appropriate Government had jurisdiction to make reference. Thus according to him, if the question of jurisdiction which could be decided from the material that might have been placed at the time of the hearing of the reference, if allowed to be raised for the first time would prejudice the body of workmen represented by the union.

9. Mr. Adhvaryu learned Advocate for the Board has taken us to various paragraphs from the award in order to trace out the contention with regard to the jurisdiction. However, having gone through the award we find that the question with regard to competence of the reference and jurisdiction of the tribunal does not appear to have been raised before the learned industrial tribunal both in the

content and in the spirit, which has been taken before us. Bearing in mind the position of law as per the aforesaid decisions submitted by Mr. Shahani, we are of the opinion that in the facts and circumstances of this case, the question of jurisdiction which is a mixed question of law and facts cannot be entertained as it would work injustice to the other side.“

27. In the above said decision, the same question has been examined by the Industrial Tribunal, Ahmedabad while considering the relevant provisions of Industrial Employment Standing Order Act, 1946 read with Section 79(C) regulations framed by Gujarat Electricity Board. In the case of Gujarat Electricity Board also almost similar contentions were raised against the award passed by the Industrial Tribunal, Ahmedabad by Gujarat Electricity Board which has been examined by the Division Bench of this Court and ultimately, award passed by the Industrial Tribunal increasing the age of retirement from 58 years to 60 years held to be valid and petition filed by the Gujarat Electricity Board has been dismissed and said decision of Division Bench was challenged before the Apex Court and Apex Court has also dismissed the petition filed by the Gujarat Electricity Board. The relevant

observation of the Division Bench of this Court in Para 25 and 26 which are quoted as under :

> ***"25. Finally, Mr. Adhvaryu's alternative submission was that the employees cannot be permitted to adopt 'pick and choose' method in challenging service regulations of the Board. They can either challenge all service regulations or none. From the point of view of the Board, benefit of the procedure to change 'model standing orders' available to a private employer would not be available to the Board. We are unable to accept the submission as the same is apparently misconceived. Binding force of the service regulations to individual employee continues to hold the field. It is only when a dispute between the employees as a class and the Board is referred for adjudication by the Government to the Industrial Tribunal that the challenged service regulation if not covered under Section 13-B of the Industrial Employment (Standing Orders) Act, has to yield to the adjudication process.***
>
> ***26. The object of enacting the Industrial Disputes Act, 1947 and of making provision***

therein to refer disputes to tribunals for settlement is to bring about industrial peace. Wherever a reference is made by a Government to an Industrial Tribunal, it has to be presumed ordinarily hat there is a genuine industrial dispute between the parties which requires to be resolved by adjudication. In all such cases an attempt should be made by Courts exercising powers of judicial review to sustain as far as possible the awards made by Industrial Tribunals instead of picking holes here and there in the awards on trivial points and ultimately frustrating the entire adjudicating process before the tribunals by striking down awards on hyper technical grounds. This is what has been rules in Calcutta River Transport Association and others, AIR 1988 S.C. 2168 referred to by learned Advocate Mr. Shahani.“

28. The view taken by the Apex Court in case of ***Transmission Corporation of A.P. Limited and Others v. P. Surya Bhagvan*** reported in ***2003 AIR SCW 2616***. The relevant para 10 is quoted as under:

“10 : Question as to whether the respondent was overaged for entry into

service was neither raised in the written statement nor was it argued before the High Court. Under the circumstances the appellant cannot be permitted to raise this point for the first time in this Court. The second point regarding the delay in filing the petition though was raised in the written statement, but, it seems the same was not pressed before the Bench at the time of arguments. It has not been stated in the grounds of appeal that this point was raised and argued before the Bench during the course of arguments and the Bench had failed to notice the same. In view of this we decline to go into this question as well."

29. Recently, in case of ***Executive Engineer ZP Engg. Divn. And another v. Digambara Rao etc.*** *reported in* **2004 LAB.I.C. 4052**, the relevant discussion in Para 18 is quoted as under :

"18 : The plea raised before us by the Respondents to the effect that their termination of employment fell within sub-clause (bb) of clause (oo) of the Industrial Disputes Act, apart from having not been raised before the Labour Court

and the High Court, in our opinion, is not available to them having regard to the decision of the High Court in the writ petitions filed by the Respondents.“

30. In view of the above observation and discussion, the contention raised by the learned advocate Mr. Gandhi that decision given by this Court in ORG case as referred above is applicable to the facts of this case. According to my opinion, decision in ORG case is not applicable to the facts of this case. In ORG case, specific contention was raised before the Tribunal and before this Court that ORG is not an industrial establishment under the provisions of Standing Orders Act, 1946, but, in this case, no such contention was raised before the Industrial Tribunal, Baroda by the petitioner and no such contention was raised before this Court in Special Civil Application No.12927 of 1994 dated 12th December 2004. Therefore, it is first time, this contention has been raised in the present petition which was not raised before the Tribunal is not allowed to be raised before this Court as it involved mixed question of facts and law. Therefore, that contention has been rejected.

31. The decision in ORG case is not applicable to the facts of this case and both are on different footing as nature of Business of both companies

are altogether different and not having same kind of business and therefore, this decision also is not helpful to the learned advocate Mr. Gandhi. The same and similar activities are not carried out by both the companies. On the contrary, activities and nature of business of both the companies are totally different and not identical. It is not the case of present petitioner that petitioner having same nature of business and activities as it has having by ORG Company.

32. I have considered the submission made by both the learned advocates after perusing the award in question and decision given by this Court in ORG case as referred above, according to my opinion, Industrial Tribunal has not committed any error while passing such award and coming to the conclusion that Employment Standing Orders Act, 1946 is applicable to the petitioner, as no such contention was raised before the Tribunal by petitioner, therefore, once the petitioner is covered by definition of industrial establishment as defined under the provisions of Employment Standing Orders Act, 1946 and in absence of certified standing orders, Model Standing Orders are applicable to the petitioner and employees who are working under it. Therefore, the age of retirement in such circumstances should be 60 years and not 58 years. By legal fiction or by

operation of the provisions of Model Standing Orders Act, 1946, the condition of service which governed under the provisions of Standing Order is fixed the age of retirement or superannuation is 60 years. No contrary agreement/settlement/ award has been pointed out by the petitioner before the Tribunal, therefore, Employment Standing Orders Act, 1946 being a Special Act having a provisions to have certified standing orders under the provisions of Standing Orders Act, 1946 and in absence of that Model Standing Orders under the Act is applicable to the industrial establishment and therefore, Rule 25 of such model standing order is become a condition of service of such employees those who are working with petitioner company. That service condition has been changed by the petitioner during the pendency of reference / dispute. No prior permission has been obtained, therefore, it amounts to breach of Section 33 of the Industrial Disputes Act, 1947, therefore, Industrial Tribunal, Baroda has rightly examined and decided the matter in accordance with law. For that, there is no error which apparently found on the face of the record committed by the Tribunal which required interference by this Court under Article 227 of the Constitution of India. This Court having limited jurisdiction under Article 227 of the Constitution of India. The relevant observations made in the following decisions

which are relevant quoted as under :

(i) This aspect has been considered by the Apex Court in ***Laxmikant Revchand Bhojwani and another versus Pratapsing Mohansingh Pardeshi***, reported in ***(1995) 6 SCC 576***. Relevant observations made by the apex court in para 9 of the said judgment are therefore reproduced as under:

> "The High Court under Article 227 cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where grave injustice would be done unless the High Court interferes. "

(ii) In case of ***Ouseph Mathai and Others versus M. Abdul Khadir***, reported in ***(2002) 1 SCC 319***, the Apex Court observed as under in para 4 and 5 :

> "4. It is not denied that the powers conferred upon the High Court under Articles 226 and 227 of the Constitution are extraordinary and discretionary powers as distinguished from ordinary statutory powers. No doubt Article 227

confers a right of superintendence over all courts and tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said Article as a matter of right. In fact power under this Article cast a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such courts and tribunals in accordance with law conferring powers within the ambit of the enactments creating such courts and tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this Article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party.

5. In Waryam Singh v. Amarnath (1954 SCR 565) this Court held that power of superintendence conferred by Article 227 is to be exercised more sparingly and only in appropriate cases in order to keep the subordinate Courts within the

bounds of their authority and not for correcting mere errors. This position of law was reiterated in Nagendra Nath Bose v. Commr. of Hills Division (1958 SCR 1240). In Bhahutmal Raichand Oswal v. Laxmibai R. Tarta (AIR 1975 SC 1297) this Court held that the High Court could not, in the guise of exercising its jurisdiction under Article 227 convert itself into a Court of appeal when the Legislature has not conferred a right of appeal. After referring to the judgment of Lord Denning in R v. Northumber Compensation Appeal Tribunal, Ex parte Shaw (1952 (1) All ER 122, 128) this Court in Chandavarkar Sita Ratna Rao v. Ashalata S. Gurnam held : (SCC p.460 para 20)

"20. It is true that in exercise of jurisdiction under Article 227 of the Constitution the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any misdirection in law or a view of fact taken in the teeth of preponderance of evidence. But the High Court should decline to exercise its jurisdiction under Articles 226 and 227 of the Constitution to look into the fact in the absence of clear and cut down

reasons where the question depends upon the appreciation of evidence. The High Court also should not interfere with a finding within the jurisdiction of the inferior tribunal except where the findings are perverse and not based on any material evidence or it resulted in manifest injustice (see Trimbak Gangadhar Teland 1977 (2) SCC 437). Except to the limited extent indicated above, the High Court has no jurisdiction. In our opinion therefore, in the facts and circumstances of this case on the question that the High Court has sought to interfere, it is manifest that the High Court has gone into questions which depended upon appreciation of evidence and indeed the very fact that the learned trial Judge came to one conclusion and the Appellate Bench came to another conclusion is indication of the position that two views were possible in this case. In preferring one view to another of factual appreciation of evidence, the High Court transgressed its limits of jurisdiction under Article 227 of the Constitution. On the first point, therefore, the High Court was in error."

(iii). In case of ***Roshan Deen versus Preeti Lal***, reported in ***(2002) 1 SCC 100***, the

apex court observed as under in paragraph 12 :

"We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned Single Judge in a case where judicial mind would be tempted to utilize all possible legal measures to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it (vide State of UP v. District Judge, Unnao [(1984) 2 SCC 673: AIR 1984 SC 1401]). The very purpose of such constitutional powers being conferred on the High Court is that no man should be subjected to injustice by violating the law. The lookout of the High Court is, therefore, not merely to pick out any error of law through an academic angle

> but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-produce of an erroneous view of law, the High Court is not expected to erase such justice in the name of correcting the error of law."

33. Therefore, according to my opinion, there is no substance in the present petitions. Accordingly, present petitions are dismissed.

[H.K. RATHOD, J.]

#Dave